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No. 97-372

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1997

UNITED STATES OF AMERICA,
Petitioner,

v.

UNITED STATES SHOE CORPORATION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Federal Circuit

BRIEF OF AMICUS CURIAE Cobe Laboratories, Inc. Komatsu America International Corp. The NutraSweet Kelco Company Steelcase, Inc. Whirlpool Corporation In Support of Respondent United States Shoe Corporation

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit correctly held that the Harbor Maintenance Tax, when imposed on merchandise exported from the United States, violates Article I, Section 9, Clause 5 of the United States Constitution (hereinafter the "Export Clause"), which provides that "[n]o Tax or Duty shall be laid on Articles exported from any State."

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INTEREST OF AMICI CURIAE

Cobe Laboratories, Inc., Komatsu America International Corp., The NutraSweet Kelco Company (a unit of Monsanto Company), Steelcase Inc. and Whirlpool Corporation (hereinafter "Amici") export office furniture, medical equipment, high intensity sweeteners, excavation and mining equipment, washing machines, refrigerators and ovens. In the ten year period between 1987 and 1997, Amici have, as a group, paid in excess of $2.7 million in Harbor Maintenance Tax (hereinafter "HMT") on exports, pursuant to 26 U.S.C. § 4461 (1994). Also, each of the Amici has filed individual cases in the United States Court of International Trade to challenge the constitutionality of the HMT. As the instant case was selected by that court as a test case on the question of the constitutionality of the HMT, and because Amici's cases were stayed by that court pending final disposition of the case at bar, Amici have a direct and substantial interest in the outcome of this case.

The government has asserted that the HMT does not violate the Export Clause and provides a benefit to all exporters. However, the facts surrounding Amici's own export activities alone demonstrate otherwise. Consequently,

Amici wish to provide the Court with this information and respectfully submit this brief to the Court.

On January 9, 1998, Amici made requests to all parties before the Court for oral argument for leave to file this *amicus curiae* brief. United States Shoe Corporation, through counsel Brian S. Goldstein, consented by letter dated January 12, 1998. The United States, through its Solicitor General, the Honorable Seth P. Waxman, also consented by letter dated January 12, 1998.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case in the Brief filed by Respondent, United States Shoe Corporation.

SUMMARY OF ARGUMENT

This Court's clear and longstanding Export Clause jurisprudence demonstrates that the HMT is an unconstitutional tax on exports. The strict language of the Export Clause prohibits any and all taxes upon exports, and only the most narrowly drawn user fee for governmental

services related to exports could possibly be permitted under this clause. An analysis of the HMT demonstrates that it cannot meet the stringent requirements for any such exception. As the United States Court of Appeals for the Federal Circuit (hereinafter "CAFC") and the United States Court of International Trade (hereinafter "CIT") correctly found, the HMT is intended neither to regulate commerce nor to repay the cost of services provided to exporters. This conclusion is strengthened by the fact that exporters, such as Amici, who pay HMT at particular ports often receive little or no benefit from these HMT payments at those ports. In addition, while it has been suggested that exporters nonetheless benefit because HMT funds are used to develop and maintain the nation's transportation infrastructure, this purported benefit is largely illusory. Exporters are typically limited by geographic and economic constraints to using a small number of ports. Because exporters do not have the luxury of choosing or using other ports, they receive no benefit from the HMT they pay if these funds are not somehow allocated, at least in part, for the maintenance of ports they use.

This Court has applied a three-prong test for distinguishing between user fees and taxes in cases that did not concern the Export Clause. This Court's Export Clause

jurisprudence is clear and controlling, and non-Export Clause cases are not relevant to determining the constitutionality of the HMT. However, even assuming *arguendo* that these other cases do apply, it is clear that under the three-prong test the HMT is a tax. First, the HMT is not based on a fair approximation of use, since it is an *ad valorem* tax. There is no relationship whatsoever between the amount of HMT collected at a particular port and exporters' use of that port. Second, the HMT is not fairly apportioned to the cost of the supposed benefits conferred. The enormous surplus of HMT revenues over expenditures highlights the complete lack of correlation between HMT revenues and the cost of any services provided. Third, the HMT is discriminatory, since it exempts many activities and commodities from payment of HMT.

ARGUMENT

I. The HMT is an Unconstitutional Tax on Exports, in Violation of the Export Clause of the United States Constitution.

The Court has traditionally interpreted the Export Clause of the United States Constitution to prevent any and all taxes

on exports. *See, e.g., Fairbank v. United States*, 181 U.S. 283 (1901); *United States v. Hvoslef*, 237 U.S. 1 (1915); *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19 (1915). The Court recently reaffirmed the broad, expansive and protective nature of the Export Clause in *United States v. International Business Machines Corp.*, 116 S. Ct. 1793 (1996). In that case, after examining the historical underpinnings of the Export Clause, the Court categorically rejected the government's assertion that the "narrow historical purpose" behind the clause required a restrictive interpretation of the clause's language:

> While the original impetus [behind the Export Clause] may have had a narrow focus, the remedial provision that ultimately became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language.

Id. at 1803.

In following these precedents, the CAFC correctly affirmed the CIT's holding that the HMT is an unconstitutional tax on exports, in violation of the Export Clause. *United States Shoe Corp. v. United States*, 114 F.3d

1564 (Fed. Cir. 1996), *aff'g* 907 F. Supp. 408 (Ct. Int'l Trade 1995). The CAFC reasoned that for the HMT to pass constitutional muster, the tax must either be primarily intended to regulate commerce (not to raise revenue) or be intended to recoup the cost of services rendered to exporters under a regulatory scheme. On analyzing the precise nature and effect of the tax, the CAFC correctly held that the HMT utterly failed to satisfy either one of these criteria. *Id.* at 1575-77.

A. The HMT is Intended to Raise Revenue in Violation of the Export Clause.

One of the permissible objectives that might be allowed under the Export Clause, according to the CAFC, is if the HMT served the purpose of regulating commerce, as opposed to raising revenue. However, as the CAFC correctly noted, "[t]he government has failed to point to any indication that the HMT is intended to regulate commerce. Indeed, it appears that the HMT regulates nothing." *Id.* at 1576. While less blunt, the CIT decision also provided a telling analysis of why the HMT does not regulate commerce: the HMT "does not seek to control the amount or manner of port use ... does not seek to influence commercial practices, or

seek to enforce compliance with a legislative goal ...." *United States Shoe Corp. v. United States*, 907 F. Supp. 408, 413-14 (Ct. Int'l Trade 1995) (citing S. Rep. No. 99-126, at 7 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644), *aff'd*, 114 F.3d 1564 (Fed Cir. 1996). Instead, the court concluded, Congress "sought funding for the extensive maintenance projects envisioned under the Act [establishing the HMT]." *Id.*

In support of their finding that the HMT was not intended to regulate commerce, both the CIT and CAFC also contrasted the HMT's statutory authorization, the Water Resources Development Act of 1986, Pub. L. No. 99-662, § 1402, 100 Stat. 4082, 4266 (1986) (codified as amended in scattered sections of U.S.C. Titles 26 and 33), with the export regulatory program analyzed by the United States Court of Appeals for the Ninth Circuit in *Moon v. Freeman*, 379 F.2d 382 (9th Cir. 1967). In that case, the Ninth Circuit concluded that an export certificate program, which in effect imposed a monetary penalty for overproduction of wheat, was intended primarily to regulate foreign and domestic commerce in wheat, not to raise revenues. *See id.* at 384. The court explained that the key question is whether the *primary* purpose of the program is to regulate commerce or to raise revenue:

> The test to be applied is to view the objects and purposes of the statute *as a whole* and if from such examination it is concluded that revenue is the primary purpose and regulation is merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment.

Id. at 391 (emphasis added) (quoting *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943).

1. The most cursory examination of the revenues generated by the HMT demonstrates that the HMT is primarily intended to raise revenue. Even at the time of its passage, Congress realized that the HMT would raise far more funds than were needed to maintain the nation's harbors and waterways, and that these excess funds could be used to offset the federal deficit. The House Committee on Ways and Means, for example, observed that "[t]he increase in net budget receipts of $731 million over the 5-year fiscal period, 1986-1990, will reduce the potential Federal budget deficit

by a like amount." H.R. Rep. No. 99-251(III), at 19 (1985). The Senate Environment and Public Works Committee noted that the HMT would raise an estimated $140 million annually. S. Rep. No. 99-126, at 9 (1985), *reprinted in 1986* U.S.C.C.A.N. 6639, 6646. True to these hopes, the HMT has generated enormous surpluses since its inception. In 1993, the Harbor Maintenance Trust Fund (hereinafter "HMT Trust Fund") contained a surplus of over $450 million. As of fiscal year 1996 the total surplus had reached $865 million, and is expected to grow to nearly $3 billion by fiscal year 2001. *See Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1993* at 5 (1994) (hereinafter "*Second Annual Report*"), *cited in U.S. Shoe*, 907 F. Supp. at 412; *see also Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Years 1995 and 1996* at 7 (1997) (hereinafter "*Fourth Annual Report*").

Moreover, Congress itself has undercut the government's feeble assertion that the HMT is not intended to raise revenue (Pet'r Br. at 16-18), by acknowledging in these very statements that the HMT surplus is being used to offset the federal deficit. In essence, the surplus generated by HMT collections in excess of expenditures is being used to reduce the amount of the federal government's debts, thereby

creating a more favorable financial picture and allowing the government to more easily borrow money for other projects.

2. The HMT not only raises revenue, but also is harmful to the U.S. economy. The federal government has a general policy of promoting U.S. exports. Unlike the export certificate program in *Moon*, 379 F.2d at 382, through which regulation was achieved by penalizing overproduction, U.S. exports are encouraged by Congress through various export assistance programs and entities. *See, e.g.*, 12 U.S.C. § 635 (1994) (establishing the Export-Import Bank of the United States "to aid in financing and to facilitate exports of goods and services"); 22 U.S.C. § 2191 (1994) (creating the Overseas Private Investment Corporation in order to promote investments in and exports to developing countries); 15 U.S.C. § 649 (1994) (establishing the Office of International Trade for the purpose of "working in close cooperation with the Department of Commerce and other relevant Federal Agencies ... engaged in export promotion efforts"); 15 U.S.C. § 4721 (1994) (establishing the International Trade Administration's United States and Foreign Commercial Service, which is directed to "place primary emphasis on the promotion of exports of goods and services from the United States"). The HMT acts in direct opposition to these other programs by taxing, and therefore raising, the cost of

exports, often significantly. For example, the cost of HMT on a single earth moving machine or mining truck exported by Komatsu America International Corp. may be over $1,000 *per vehicle*. Increased costs mean reduced or eliminated profit margins, and thus fewer U.S. jobs,[1] as well as a worsened U.S. balance of payments. By discouraging exports through taxation, the HMT ironically works against the very programs Congress has created to promote exports.

B. The HMT is Not Intended to Repay the Cost of Services Provided to Exporters.

Moreover, both the CAFC and CIT correctly concluded that the HMT is not designed to repay the cost of services provided to exporters. As the CAFC found, the HMT is intended to "rais[e] money to maintain the harbors *in a manner that is not reasonably connected to the exporter's use of the harbors*, and is therefore unconstitutional." *U.S. Shoe*, 114 F.3d at 1576 (emphasis added). The CIT held that "little nexus binds the imposition of the *ad valorem* tax on cargo to the costs of port maintenance and regulation of

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[1] Amici alone employ a total of approximately 45,000 people in United States.

shipping," and observed that the HMT has "no mechanism to ensure that the fees collected will be used 'only or primarily for the cost of' port maintenance associated with the shipping that is taxed." *U.S. Shoe*, 907 F. Supp. at 414-15. As discussed below, a comparison of Amici's HMT payments on exports with the government's own studies of HMT expenditures fully supports the courts' findings. In the absence of the slightest correlation between HMT payments and expenditures, the government's contention that the HMT is a legitimate user fee intended to cover the cost of services provided to exporters amounts to no more than pure fantasy and wishful thinking.

1. The government's argument suggests that there does not need to be any correlation between HMT payments made at a particular port and HMT expenditures made at that port. (Pet'r Br. at 29). The government's national, port welfare-based argument may be summarized as a syllogism:

(1) Maintenance of the nation's infrastructure benefits all exporters.

(2) The HMT is intended to help maintain the nation's infrastructure.

(3) The HMT therefore benefits all exporters.

The State of Oregon, as amicus, also advances this argument. (Oregon Amicus Br. at 6-10). However, it should be noted that Oregon has a vested interest in doing so, because as the government's own study shows, Oregon ports have received virtually a 100 percent return between HMT fees collected on exports and port expenditures by the Federal Government, a rare event in HMT history. *See* Army Corps of Engineers, *Estimated Receipts of Harbor Maintenance Fee from Cargo Transiting Major Ports* (1992) (draft) (hereinafter "*Army Corps of Engineers Report*").

However, this port welfare argument is fatally flawed, because it rests on the faulty assumption that all exporters invariably benefit from harbor maintenance expenditures at ports they do not use. This is simply not the case. First, four of the Amici are located in Illinois and Michigan, which are serviced by the Great Lakes ports. In addition to these ports not having the necessary port infrastructure to accept Amici's shipments, they possess several geographic and atmospheric limitations: (1) the Great Lakes connect to the Saint Lawrence Seaway, which is the route eastward toward Europe; and (2) due to snow, ice and other extreme weather

conditions, the route is not available for several months of each year.[2]

Second, for shipments to Latin American and Asian markets, all five Amici must rely on southern and west coast ports, particularly Cobe Laboratories, Inc., which is located in Colorado and is completely landlocked. In other words, for all five Amici, geographically local ports are unavailable or do not exist. To suggest that Illinois, Colorado and Michigan exporters derive benefits from local ports they cannot use, or which do not exist, is ludicrous. On the contrary, high transportation costs restrict these exporters to a small number of ports located in distinct geographic regions, such as the west coast and Florida. To them, it is irrelevant whether all other U.S. ports are well-maintained or not; Amici can only benefit from harbor maintenance expenditures at the ports they can use.

For example, Amici sell high value goods such as excavation equipment, mining equipment and medical equipment to Latin American and Pacific rim markets. Other

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[2] Ironically, an alternative route during that time is overland via rail to Montreal, thus avoiding payment of HMT. *See* 19 C.F.R. § 24.24(b).

high volume products, such as sweeteners, also translate into high value exports on a cumulative level. Amici typically export these products to those markets by sea from ports located in the states of Florida and California. Again, the simple reason is geography. It is not commercially viable for them to ship these products from ports located in other regions of the country, since this would greatly increase overland transportation costs. Splitting their exporting activities among a larger number of ports is also economically undesirable, because this would eliminate any volume-based discounts which these exporters may obtain for overland or sea transport of these goods.[3]

Due to the fact that they must use a small number of ports in distant areas of the country, exporters such as Amici can receive no benefit from their HMT payments unless those funds are expended, at least in part, to maintain the ports used by them. Yet even the government has conceded that "[t]here is no relationship between the amount of money

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[3] The State of Oregon acknowledges that economies of scale and containerization have led exporters to concentrate their export activities at a smaller number of terminals. (Oregon Amicus Br. at 8) (citing Transportation Research Board, National Research Council, *Landside Access to U.S. Ports* at 42 (1993)).

spent on a port's maintenance and the amount of revenue collected from cargo moving in or out of that particular port." *Corps of Engineers Briefing Book and Fact Sheets on the HMT and Fund* at 1 (Feb. 14, 1990). Without such a relationship, the HMT clearly does not repay the cost of services allegedly provided to Amici as exporters, and is therefore a tax.

2. HMT revenue and expenditure data for certain west coast and southern ports demonstrate the accuracy of this conclusion. For example, in 1992, exporters using the ports of Los Angeles and Long Beach, California paid approximately $141,746,000 in HMT on exports from those ports, yet the ports in question only received roughly $162,000 in HMT expenditures. In other words, receipts exceeded expenditures at those ports by 875 to 1. Similarly, exports in that same year from Tacoma, Washington generated an estimated $28,687,500 in HMT revenues, yet this port only received $135,500 from the HMT Trust Fund for port maintenance (a ratio of 212:1). Revenues and expenditures in 1992 for various west coast and southern ports show this disparity:

Port	HMT Revenues	HMT Expenditures	Ratio
Los Angeles/ Long Beach	$141,746,000	$162,000	875:1
Jacksonville/ Port Everglades	$17,442,500	$290,800	60:1
Miami	$17,360,000	$683,000	25:1
Tacoma	$28,687,500	$135,500	212:1

See Army Corps of Engineers Report. While these figures are approximate only, they do convey the severe disparity between the HMT which exporters who use these ports (such as Amici) are required to pay and the so-called "benefits" they receive at those ports from these payments.

This imbalance is strikingly illustrated by the fact that during 1992 alone, Amici paid a total of over $330,000 in HMT on exports--a figure that exceeds the estimated HMT expenditures at the ports of Los Angeles, Long Beach, and Tacoma *combined*. As the government has noted, there are over four thousand HMT cases pending below, yet these five companies alone contributed amounts equal to half the cost of expenditures at a major port for Latin American exports

such as Miami, and paid twice the amount expended at Los Angeles/Long Beach, a major port for Pacific rim markets. (Pet'r Br. at 4); *See also Army Corps of Engineers Report*.

As noted above, these HMT figures also suggest a motive for Oregon's statements in favor of the HMT. In 1992, approximately $18,650,000 in HMT expenditures were made at the port of Portland, Oregon. In that same year, exporters using that port paid just over $19,000,000 in HMT. *See Army Corps of Engineers Report*. Unlike other major west coast ports, such as Los Angeles and Long Beach, Portland received nearly as much in HMT expenditures as it generated in HMT revenues on exports. Even its sister port in the neighboring state of Washington (Tacoma), which in 1992 generated 50 percent more HMT revenue from exports than Portland, was nowhere near as fortunate as Portland and received a paltry $135,000 in HMT expenditures. *See id.* Given such significant and large-scale investment in its port facilities, it is certainly understandable that Oregon would be reluctant to lose this lucrative source of funds.

Amici's choice of ports is limited due to the bulky nature of their goods and by the cost of U.S. inland transportation for such goods. As such, exporters such as Amici can only benefit from HMT expenditures made at

ports which they actually use. Yet the HMT payments of the five Amici alone demonstrate there is no rational relationship between HMT revenues collected from ports they actually use and HMT expenditures made at those ports. The inevitable conclusion is that, as found by the courts below, there is little or no nexus between the HMT payments made by exporters and the benefits they receive, and that the HMT is not intended to repay the cost of services provided to exporters.

3. Amici's objections to the HMT should not be misconstrued as opposition to a well-designed program to maintain and develop this nation's waterways and port facilities. Harbor maintenance and upkeep is undeniably important. However, funding such programs via a tax on exports is not the proper means for achieving this end. As the Court has noted, when there is a conflict between a congressional statute and the Constitution, the Constitution must prevail. *See Adkins v. Children's Hosp. of the Dist. of Columbia*, 261 U.S. 525, 544 (1923). In any case, affirmance of the lower courts' decisions regarding the HMT will not eliminate the government's ability to maintain the nation's ports and waterways, as the constitutionality of HMT as applied to other than exports is not in question. As exports account for only 27 percent of HMT collected, the

remaining HMT funds still will be available for port maintenance. *See Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1994* at 3 (1995).[4]

II. The Cases Relied Upon by the Government in Contending that the HMT is a Permissible User Fee are not Relevant in the Export Clause Context.

As discussed above, this Court's Export Clause jurisprudence, including *IBM*, 116 S. Ct. 1793, demonstrates unequivocally that the Export Clause's prohibition on taxation of exports must be construed broadly, and that the HMT is an impermissible tax upon exports. Despite these clear pronouncements, the government fails even to cite the *IBM* decision in its brief with this Court. Instead, the government turns to non-Export Clause jurisprudence in a poor attempt to portray the HMT as a permissible user fee. However, the cases on which the government bases its

[4] This 27 percent figure is based on the total of exports as a percentage of net HMT collections shown in the table on page 3 of the report.

argument are simply not relevant to determining whether the HMT violates the Export Clause.

In its effort to present the HMT as a permissible user fee, rather than an impermissible tax, the government relies primarily on *Massachusetts v. United States*, 435 U.S. 444 (1978), and *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). These cases employed the following test to distinguish between user fees and taxes:

> (1) Whether the charge is based on a fair approximation of use.
>
> (2) Whether the charge is fairly apportioned to the cost of benefits provided.
>
> (3) whether the charge is nondiscriminatory.

Under this analysis, if all three criteria are answered affirmatively, a charge is a permissible user fee; otherwise, the charge is a tax. *Massachusetts*, 435 U.S. at 466-67 (citing *Evansville-Vanderburgh*, 405 U.S. at 707).

These decisions are not relevant to the instant case, because they do not concern the Export Clause. Rather, the *Massachusetts* decision addressed the question of whether an aircraft registration fee violated the intergovernmental tax immunity doctrine; the *Evansville-Vanderburgh* case dealt with the validity of an airport user fee under the Commerce Clause. However, it is this Court's clear Export Clause precedents, not a user fee test analogized from other areas of law, which are controlling. *See, e.g., IBM*, 116 S. Ct. 1793.

1. Yet even assuming *arguendo* that the analysis set forth in *Massachusetts* and *Evansville-Vanderburgh* is relevant, it is clear that under this three-prong test the HMT is an unconstitutional tax on exports, not a permissible user fee. First, the HMT is not based on a fair approximation of use. As the CIT correctly noted, exporters of high value goods pay proportionately more HMT, even though they impose less of a burden on port resources, channels, and harbors than exporters of low value bulk goods, which pay proportionately less HMT. *See U.S. Shoe*, 907 F. Supp. at 415. Regardless of a cargo's weight, volume, or difficulty of loading, HMT is always assessed solely on the basis of the cargo's value. *See* 26 U.S.C. § 4461 (1994). In comparison, the charges at issue in the *Massachusetts* and

Evansville-Vanderburgh cases were flat fees. Also, as discussed above, there is absolutely no relationship between the HMT funds collected at a particular port and the expenditures from the HMT Trust Fund used to maintain and improve that port. *See U.S. Shoe*, 907 F. Supp. at 415; *Army Corps of Engineers Report*.

Moreover, as demonstrated above, the government's contention that all exporters benefit from nationwide HMT expenditures, regardless of whether these expenditures are made at ports used by these exporters, is simply false. The government's citation of the *Massachusetts* decision in support of this claim is equally unpersuasive. That case involved a user fee assessed against aircraft for airport services. As the Court found in that case, aircraft, by their very nature, do benefit from a fee that contributes to nationwide airport services, since any given aircraft could land at numerous airports nationwide and receive airport services there. *See Massachusetts*, 435 U.S. at 468. This reasoning simply cannot be applied to exporters of high value goods, who do not benefit from HMT expenditures at ports

they cannot use.[5] The government's argument flies in the face of commercial realities and must be rejected.

2. Second, the HMT is not fairly apportioned to the cost of benefits conferred. Since its inception, HMT revenues have far outpaced the cost of harbor maintenance. As noted above, the total surplus exceeded $860 million by fiscal year 1996, and is projected to reach nearly $3 billion by fiscal year 2001. *See Fourth Annual Report* at 7; *see also Second Annual Report* at 5. In fact, the HMT Trust Fund's surplus for the first eight months of fiscal year 1996 ($167 million) was nearly equal to the amount of HMT collected on exports alone for that same period ($166 million). *See Dept. of the Treasury Harbor Maintenance Trust Fund Income Statements 10/01/95-05/31/96*. While a user fee need only be a "fair approximation of the cost of benefits supplied" and not a precise calculation, since such precision would be unduly burdensome, *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989) (quoting *Massachusetts*, 435 U.S. at 463 n.19), the HMT Trust Fund's gross disparity between receipts and

[5] Contrary to the government's assertions to Congress in the Annual Reports on the status of the HMT Trust Fund, the exports of Amici show that exports are *not* generally low value bulk goods. *See, e.g., Second Annual Report* at 2.

expenditures is in no way, shape, or form a "fair approximation."

In addition, the HMT is not fairly apportioned to the cost of benefits supplied (if any) because there is no relationship between HMT receipts at a given port and expenditures at that port. This lack of correlation between HMT paid and expenditures received at various ports is clearly illustrated by the Army Corps of Engineers' figures, which list HMT revenues and expenditures for various ports.[6] *See Army Corps of Engineers Report*. As the Court of International Trade noted in its opinion, this report demonstrates that large ports pay the majority of the HMT, but receive no more than thirty percent of these payments back in the form of maintenance expenditures at those ports. *U.S. Shoe*, 907 F. Supp. at 415 (citing *Army Corps of Engineers Report*).

3. Third, the HMT is discriminatory, since it provides numerous exemptions from payment of the HMT. For example, ferries, ship's stores, noncommercial vessels, and shipments to and from Alaska, Hawaii, Puerto Rico, and U.S. possessions are exempted from HMT payments. Deep

[6] Some of these figures are cited above in section I.A.

draft vessels that enter a port for repairs and cargo vessels that unload and depart empty are also excluded, even though these vessels indisputably do use port resources and contribute to port deterioration. These exceptions unquestionably discriminate in favor of certain ports and port activities, and against ordinary exporters, who in effect are helping to subsidize port use by exempted parties--including U.S. government ships that are allowed to use deep water ports without paying the HMT--so that the cost of maintaining harbors they use is inevitably subsidized by exporters such as Amici. *See* 26 U.S.C. § 4462 (providing various exemptions from HMT payments).

Under the *Massachusetts/Evansville-Vanderburgh* analysis, a charge that fails to meet any one of these three criteria is an unconstitutional tax, not a permissible user fee. In this case, the HMT on exports fails on all three counts, and accordingly is without question an unconstitutional tax on exports.

CONCLUSION

For the above reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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